

No.17

Office Supreme Court, U.S.

FEB 3 1969

JOHN F. DAVIS

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

UNITED STATES OF AMERICA, *Petitioner*

v.

THE DONRUSS COMPANY, *Respondent*

*On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit*

PETITION FOR REHEARING

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February, 1969



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Respondent, The Donruss Company, hereby petitions this Honorable Court pursuant to Rule 58 for rehearing with respect to that part of the Opinion of the Court dated January 13, 1969 which limits the issue to be determined by the District Court upon remand to "whether avoidance of shareholder tax was one of the purposes of respondent's accumulations." (p. 5) In support of its petition, respondent states as follows:

GROUND FOR REHEARING

1. In presenting its case to the District Court upon the issue framed by the Court, respondent will necessarily introduce evidence concerning all of the business needs which it claims objectively justify its accumulations, because the existence or absence of such reasons and the substantiality

or credibility thereof will be relevant to the issue of respondent's purpose or purposes for accumulating its earnings. Accordingly, there will be no significant economy in limiting jury consideration to the subjective issue alone.

2. Because the subjective and objective issues are so inextricably intertwined, a trial on the subjective issues alone would tend to confuse the jury. Moreover, if the District Court were to instruct the jury that as a matter of law respondent accumulated its earnings in excess of what was reasonably needed in its business and that consequently, one of the purposes for the accumulations is presumed to be avoidance of shareholder tax, respondent would be unduly prejudiced in the eyes of the jury in presenting its case on the issue of purpose. In this regard respondent notes by way of analogy that in civil actions where an issue of punitive damages, and thus intent, is involved, a court reversing on the damage issue would not order a new trial on that question alone. See, e.g., *Crowell Collier Publ. Co. v. Caldwell*, 170 F.2d 941 (5th Cir. 1948); *Walcher v. Loew's, Inc.*, 129 F. Supp. 815 (E.D. Mo. 1949). To do so would be highly prejudicial. Thus, the Court of Appeals herein apparently recognized the confusion and prejudice which would result from a trial on the intent issue alone and its remand was not so limited. Record at 60, 61.

3. Subsequent to the hearing of this case in the District Court (the jury verdict was returned on February 19, 1965, Record at 1), a number of significant cases have been decided which deal with the determination of reasonable business needs. For example, the Tax Court in *Bardahl Mfg. Co.*, 24 CCH Tax Ct. Mem. 1030 (1965) and the First Circuit in *Apollo Industries, Inc. v. Commissioner*, 358 F.2d 867 (1st Cir. 1966) enunciated new formulae for computing working capital needs, thus shedding some light upon an area which was theretofore confused and contradictory, compare, e.g., *Shaw-Walker Co. v. Commissioner*, 390 F.2d 205 (6th Cir. 1968), vacated and remanded on other grounds, ___ U.S. ___ (No. 95, Jan. 27, 1969) and *John P. Scripps*

Newspapers, 44 T.C. 453 (1965), with *F. E. Watkins Motor Co.*, 31 T.C. 288, 299 n.7 (1958), *acq.*, 1959-1 *Cum. Bull.* 5, and *J. L. Goodman Furniture Co.*, 11 T.C. 530, 535 (1958), *acq.*, 1949-1 *Cum. Bull.* 2. Similarly, in *Freedom Newspapers, Inc.*, 24 CCH T.C. Mem. 1327 (1965), the Tax Court has significantly liberalized the evidence required to justify earnings accumulations on the grounds of business expansion. *Accord*, *Faber Cement Block Co.*, 50 T.C. No. 17 (1968); *Shaw-Walker Co.*, 24 CCH Tax Ct. Mem. 1709 (1965), *rev'd on other grounds*, 390 F.2d 205 (6th Cir. 1968), *vacated and remanded*, ___ U.S. ___ (No. 95, Jan. 27, 1969). Respondent submits that to limit the hearing on remand solely to the issue of the subjective purposes for the earnings accumulation would be unduly prejudicial in that respondent would be denied the opportunity to develop a factual presentation on the issue of reasonable business needs in light of these recent decisions.

4. As previously stated, in reversing the judgment of the District Court and remanding for a new trial, the Court of Appeals did not limit the question to be determined thereupon to respondent's purposes for its earnings accumulation. Moreover, petitioner requested such a limitation neither before this Court, Brief for Petitioner at 27, nor before the Court of Appeals, Brief for Appellant at 19. Accordingly, the Court's restriction of the scope of the remanded proceedings comes without request therefor or the benefit of argument or discussion thereon, either here or in the Sixth Circuit.

CONCLUSION

Respondent respectfully requests this Court to issue its judgment and mandate directing that a complete *de novo* proceeding be held by the District Court.

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CERTIFICATE OF COUNSEL

Pursuant to Rule 58 of the Rules of the Court, the undersigned hereby certifies that this Petition for Rehearing is presented in good faith and not for delay.

RICHARD L. BRAUNSTEIN

